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FILED
MAY 23 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 823

SIMS MOTOR TRANSPORT LINES, INC., an Illinois Corporation, *Appellant*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION

On Appeal from the United States District Court for the Northern District of Illinois

MOTION OF INTERVENORS TO AFFIRM

REX EAMES
1800 Buhl Building
Detroit 26, Michigan
WOodward 1-5905

ROLAND RICE
618 Perpetual Building
Washington 4, D. C.
REpublic 7-7173

Attorneys for Intervenors

Of Counsel

FRANKLIN R. OVERMYER
111 W. Monroe Street
Chicago 3, Illinois
RAndolph 6-1025

April 1960

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Statement	2
Argument	3
Conclusion	16

CITATIONS

Cases:

Atlanta-New Orleans Motor Freight Co. v. Eagle Motor Lines, Inc., 69 M.C.C. 257	7
Black Extension of Operations—Prefabricated Houses, 48 M.C.C. 695	10
Descriptions in Motor Carrier Certificates, 61 M.C.C. 209	6, 7, 9, 10, 12
Eclipse Motor Lines, Inc., Interpretation of Certificate, 52 M.C.C. 391	7, 10
Nelson, Andrew G., Inc. v. U.S., 355 U.S. 554 (1957)	4, 6
Pierce Auto Freight Lines, Inc. v. Converse, 54 M.C.C. 447	10
Rochester Telephone Corp. v. United States, 307 U.S. 125	4
United States v. Pierce Auto Freight Lines, 327 U.S. 515 (1946)	4
Universal Camera Corp. v. Labor Board, 340 U.S. 474	4
Watson Brothers Transportation Company v. United States, 132 F. Supp. 505, affirmed 350 U.S. 927	5
Wilson Common Carrier Application, 64 M.C.C. 39	12

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MOTION OF INTERVENORS TO AFFIRM DECISION OF DISTRICT COURT

Now come, Holland Motor Express, Inc., Doyle Freight Lines, Inc., C. A. Conklin Truck Line, Inc., Saginaw Transfer Company, Inc., Kramer Bros. Freight Lines, Inc., Interstate Motor Freight System, Wolverine Express, Inc. and The Regular Common Carrier Conference of American Trucking Associations, Inc., Intervenors, and pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, hereby move to affirm the decision of the United States District Court for the Northern District of Illinois, Eastern Division, dated November 18, 1959, on the following grounds:

(1) That it is manifest the questions on which the decision in this cause depend are so unsubstantial as not to need further argument.

(2) That the District Court's decision in affirming the Order of the Interstate Commerce Commission here in question is in acordance with applicable law.

(3) That said Order of the Interstate Commerce Commission is wholly reasonable, and not arbitrary, capricious, or clearly erroneous.

STATEMENT

These intervenors were authorized by the District Court to intervene as parties, and they here appear in support of the position of the Interstate Commerce Commission in this proceeding. The intervenors consist of seven general commodity motor common carriers of property operating in interstate commerce pursuant to authority issued by the Defendant Commission, and one association of over 2,000 motor common carrier members. Since the interpretation sought by appellant would greatly expand its operations, if approved, and thus its competition and the competition of numerous other motor carriers with similar authority, the interest of intervenors in the outcome of this controversy is very substantial.

Appellant's Jurisdictional Statement sets forth a chronology of the proceeding before the Commission which led to the cause instituted by the appellant in the United States District Court for the Northern District of Illinois for a review of the Commission's Order. Thus, there appears to be no need to repeat such material in this Motion to Affirm.

ARGUMENT

This Court is requested by appellant to review an Order of the Interstate Commerce Commission involving a construction of certain motor carrier operating authority issued to appellant by said Commission. The finding of the Commission was that appellant's authority to transport "iron and steel articles", "iron and steel products", and "iron and steel and articles made thereof" does not authorize the transportation of "tractors, traction engines, tools and parts for tractors and traction engines, and used foundry machinery".

The appellant's position in the proceedings before the Interstate Commerce Commission was that the aforementioned commodities fall within the scope of the described authority for either of two reasons:

(1) The commodity descripitions in question on their face embrace such commodities in light of the usual meaning accorded such language by the motor carrier industry and the Commission in its prior decision; or

(2) Such commodity descriptions must be more broadly construed in the appellant's individual case in view of the particular circumstances involved in the proceedings before the Commission in which the grants of authority here in question were made.

Before analyzing the merits of appellant's position, it is proper to consider its burden before this Court and the scope of judicial review accorded decisions of the Interstate Commerce Commission. The Commission has ruled in a manner contrary to the dual argu-

ments of appellant noted above. Under the holding of this Court in *Andrew G. Nelson, Inc.* v. *United States*, 355 U.S. 554 (1957), appellant here has the burden of establishing that the order of the Commission under review is clearly erroneous. This Court stated in the *Nelson* case that a "subsequent construction of the grandfather permit by the Commission is controlling on the Courts unless clearly erroneous" (p. 558). The *Nelson* decision has ample support in prior decisions of this Court. *United States* v. *Pierce Auto. Freight Lines*, 327 U.S. 515 (1946); *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125; and *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474.

Thus, the appellant's burden before this Court, as it was before the three-judge District Court, is to establish that the ruling of the Interstate Commerce Commission here in question is plainly and clearly erroneous. In this connection, the following finding of the District Court is most significant:

> "We find that the Commission's unanimous determination that tractors and foundry equipment are not iron and steel articles or products, is not arbitrary, capricious, or clearly erroneous, but, is, on the contrary, wholly reasonable."

The District Court reached the foregoing conclusion after carefully and thoroughly considering each of the arguments and contentions presented by appellant, and which now appear to be the same arguments and contentions presented to this Court. Each of the alleged errors set forth by appellant in its Jurisdictional Statement will be considered hereafter. However, Intervenors' argument in support of the Commission's order and the decision of the District Court

will be divided into two basic issues, as hereinafter delineated.

ISSUE ONE

Do the Commodity Descriptions in Appellant's Certificate on Their Face Embrace the Commodities in Question in Light of the Usual Meaning Accorded Such Commodity Descriptions by the Motor Carrier Industry and the Interstate Commerce Commission?

Before examining the merits of this issue, it would be well to consider appellant's argument that this proceeding may result in a violation of the provisions of Section 212 of the Interstate Commerce Act (Title 49 U.S.C.A. Section 312), which provides that a certificate may not be "suspended, changed or revoked" unless certain procedures are pursued. Appellant directs our attention to several cases construing and applying the provisions of Section 212, such as *Watson Brothers Transportation Company* v. *United States*, 132 F. Supp. 905, affirmed 350 U.S. 927. An examination of the *Watson* case reveals its complete inapplicability to the type of proceeding here involved and the particular circumstances here in question. There the right of the Commission to issue a revised certificate outside the terms of Section 212 of the Interstate Commerce Act (49 USCA 312) was before the Court; here the issue is the Commission's interpretation of a certificate, and not the physical rewriting of that document. The distinction is great and controlling. This error of appellant in failing to differentiate colors its entire approach and, in our view, destroys the thrust of its argument.

This Court has always recognized and upheld the right of the Interstate Commerce Commission to make and provide reasonable constructions of the language

used by the Commission in outstanding certificates and permits. See, *Nelson* v. *United States*, supra. The sole inquiry in the long proceeding before the Commission in this case was the *correct construction* of appellant's authority, and a review of the record in this case amply demonstrates that no modification or revocation of authority is here presented.

Turning then to the first issue, what is the general meaning accorded the terms "iron and steel articles" and "iron and steel products" by the iron and steel industry and the motor carrier industry? In *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209, the Interstate Commerce Commission set forth commodity lists under class or generic headings specifying the commodities embraced by such class or generic headings. While the Commission expressly stated that such commodity lists would be *binding* only on *future certificates*, the Commission, nevertheless, endeavored to ascertain the trade meaning accorded such class or generic headings by the transportation industry up to that time. Quite obviously, it would be foolish for the Commission to establish definitions of commodity descriptions for application in the future where such definitions were not already in accord with the general understanding of these terms within the motor carrier industry.

One of the generic classifications dealt with by the Commission in the *Descriptions* case was "iron and steel articles". The Commission, after extensive hearings throughout the country participated in by hundreds of motor carriers and interested parties, expressly found that "the phrase 'iron and steel articles' is understood in transportation circles to mean a list of rough or semifinished articles made from iron and

steel . . ." (at p. 245). The overwhelming testimony showed that the terms "iron and steel articles" or "iron and steel products" had been historically associated in the transportation industry with the service rendered for the basic steel mills. As noted, this finding was predicated upon evidence submitted by motor carriers, motor carrier associations, shippers, shipper organizations, rail carriers and other parties who participated in such proceeding.

While the list of commodities set forth in the *Descriptions* case as falling under the generic classification of "iron and steel articles" included some finished products, the Commission, in *Atlanta-New Orleans Motor Freight Co.* v. *Eagle Motor Lines, Inc.*, 69 M.C.C. 257, noted that such finished products "are of uncomplicated design, with no moving parts, and at a stage of manufacture just beyond the in-the-rough or semi-finished classification" (at p. 260). An examination of such commodity lists set forth in the *Descriptions* case corroborates this point.

In *Atlanta-New Orleans Motor Freight Co.* v. *Eagle Motor Lines, Inc.*, supra, the Commission determined that the term "iron and steel articles" authorized the transportation of wire garment hangers which consisted "of little more than steel wire which has been shaped and enameled" (at p. 261). Surely, there is no parallel between such wire garment hangers and the professionally engineered tractors, traction engines and foundry machinery involved in this cause.

In *Eclipse Motor Lines, Inc., Interpretation of Certificate*, 52 M.C.C. 391, the Commission ruled that the term "metal products" does not embrace refrigerators. In so ruling, the Commission stated as follows:

> "A modern mechanical refrigerator is an assemblage of many individual items, some of which considered alone might be classified as metal products, some of which might collectively be referred to as machinery, and some of which are definitely not within either classification such as insulating materials, rubber products, refrigerants, and plastics. Of particular significance, however, is the fact that, in the course of manufacture, the various components lose their identity as such and are transformed into another composite article, namely a refrigerator, which has a name, character, and use separate and distinct from the components. The finished product is universally known as a refrigerator, is referred to as such in the trade, and is classified as such in National Motor Freight Classifications. Similarly, metal products and machinery, which have been transformed into an automobile, and paper which has been transformed into roofing, have lost their original identity of its own." (at pp. 393-4)

Further, the Commission noted that the term "metal products" might, in its broadest sense, be used to describe any article made entirely, or principally of metal. However, the Commission found that:

> "Through common usage, however, particularly in transportation parlance, both of the considered terms have taken on a much more restrictive meaning, separate and distinct from an academic definition of the words utilized, and articles which might conceivably or technically be considered as 'metal products' or 'machinery' are not generally comprehended by or even associated with such terms. Thus, a watch is not generally associated with either of these items, although it would probably fall within academic definitions of both. Similarly, machinery is not generally associated with the term 'metal products' and was made the subject

> of specific authorization herein, although most machinery would fall within a broad definition of 'metal products', since most machinery is made of metal." (at p. 392)

Thus, if appellant's authority to transport "iron and steel products", "iron and steel articles" and "iron and steel and articles made thereof" is construed in the light of the general meaning accorded these descriptions within the motor carrier industry, wholly aside from the particular circumstances surrounding the grants of authority here in question, it is most strongly urged that the Commission has acted correctly in ruling that appellant is not authorized to transport such traffic as tractors, traction engines, and used foundry machinery. Quite plainly, each of these commodities is an assemblage of many individual items. Through the course of manufacture, the various components have lost their identity as such and have been transformed into composite articles which have a name, character and use separate and distinct from the components.

Appellant's Jurisdictional Statement contains several arguments and contentions that are pertinent to the foregoing discussion. First, appellant argues that the Commission has made improper use of the *Descriptions* case and that the Commission is now relying too heavily on that case for the purpose of interpreting certificates in existence at the time of the promulgation of that decision. The Report of the Interstate Commerce Commission of July 15, 1957, (Page 13a of appellant's Jurisdictional Statement,) plainly discloses that the Commission did *not* consider the *Descriptions* case as controlling. Rather, the Commission did no more than to use the *Descriptions* case as *one* source of

interpretative material respecting the commodity descriptions here in question. Additional interpretative aids used by the Commission included opinion testimony submitted by appellant. The Commission stated:

> "We have given full consideration to the opinions expressed by witnesses called by Respondent in the title proceeding to the effect that, in their view, the commodities in issue are 'iron and steel articles', 'iron and steel products', or 'iron and steel and products made thereof', and we have considered the academic meanings submitted." (at p. 21a of Jurisdictional Statement)

Further, the Commission considered rulings made in cases other than the *Descriptions* case. For example, *Eclipse Motor Lines, Inc., Interpretation of Certificate*, 52 M.C.C. 391; *Pierce Auto Freight Lines, Inc.* v. *Converse*, 54 M.C.C. 447; *Black Extension of Operations—Prefabricated Houses*, 48 M.C.C. 695; and others. It is one thing to use the *Descriptions* case as the controlling decision here; it is another thing to consider it, and to supplement that consideration by additional tests. This the Commission did and the district court properly found its approach was wholly reasonable.

Lastly, the Commission, on its own motion and as an aid interpretation, reopened each of the basic proceedings from which the grants of authority here in question resulted. The Commission carefully reviewed the evidence presented in those basic proceedings to determine whether that evidence would justify a broader meaning than that normally accorded the commodity descriptions in question. This review of the basic proceedings by the Commission will be discussed more thoroughly at a later point herein. It is mentioned here only for the purpose of demonstrating that *the Commission utilized all possible*

sources of aid in arriving at a fair and reasonable construction of appellant's certificates. In so doing it went beyond what it would probably be required to do under the statute or under court decision.

Next, appellant complains that the Commission erred "in failing to give due consideration to the interpretation as given by the industry". In this connection, appellant argues that the "five traffic experts" called by appellant in this proceeding had a total of 161 years in the transportation nationally of the commodities here in question and that these witnesses "testified unequivocally that in the transportation industry and in the iron and steel industry the commodity description 'iron and steel products' embraces any commodity manufactured principally from iron or steel, including the commodities in question in this proceeding" (at p. 25 of Jurisdictional Statement).

In the first place, appellant greatly overstates the testimony of the five witnesses in question. Four of the five witnesses were employees in shipper traffic departments, and they simply testified that they had been using appellant's services for some time in the belief that appellant was authorized to transport their products. Not one of these witnesses endeavored to testify as to the normal meaning and construction accorded these commodity descriptions by either the motor carrier industry or iron and steel manufacturers. The appellant's fifth so-called expert witness candidly admitted that he was "not an expert" in the construction of commodity descriptions (see p. 100 of transcript of hearing of December 13, 1959).

Appellant's real complaint is not that the Commission failed to give due consideration to the trade mean-

ing of the subject language. Rather, appellant seems only to disagree with the Commission's conclusion as to the trade meaning accorded this language in the motor carrier industry. The Commission gave full consideration to the opinion testimony offered by appellant's witnesses as well as the opinion testimony of certain witnesses called in that proceeding by the Commission's Bureau of Inquiry & Compliance. Further, the Commission is fully entitled under law to draw upon its own expert knowledge in these matters and, particularly, the exhaustive record in the *Descriptions* case. It is clear, therefore, that there was ample evidence to support the Commission's construction of appellant's authority and that this construction should not be disturbed on appeal.

Appellant argues also that the Commission erred "in limiting the commodities to be transported to correspond precisely with those specifically mentioned in other proceedings". This argument is unsound in that its premise is not accurate. The Commission in this proceeding has not construed appellant's authority so as to limit it to the transportation of only those specific commodities handled during the "grandfather" period. The Commission has here ruled that the terms "iron and steel articles" and "iron and steel products" include *all* rough or semifinished articles made from iron and steel, as typified in the commodity lists set forth in the *Descriptions* case. Clearly, neither appellant nor its predecessors handled every one of those many commodities set forth in the commodity lists in the *Descriptions* case during their "grandfather" periods. Nevertheless, the Commission recognizes the right of appellant to handle all of such commodities. The essence of the Commission's de-

cision in this case is solely but firmly that this particular carrier's authority was never intended to cover the transportation of finished products such as tractors, traction engines, and foundry machinery."

Appellant also argues that the Commission has here failed to follow its own definition of the word "products" as provided in prior decisions of the Commission. Appellant cites *Wilson Common Carrier Application*, 64 M.C.C. 39, which dealt, in part, with the commodity description "wire products". It may well be true that the term "products" has a broader meaning under certain circumstances than is true in the commodity descriptions here involved in this proceeding. But the vital inquiry in this case is the proper meaning of the term "iron and steel products" or "iron and steel articles", and the record is perfectly clear why the Commission has construed these terms in the manner set forth in its orders and report here on appeal. The historical origin and evolution of these terms within the motor carrier industry has been reviewed extensively, and that history demonstrates that such terms were never intended to encompass all articles or products made from iron or steel.

Thus, in brief summary, these Intervenors respectfully submit that the Commission has provided a fair and reasonable construction of the meaning of the subject commodity description as these terms are understood and used in the motor carrier industry. There is substantial evidence in this proceeding to support the Commission's construction, and, therefore, it is clear that the appellant has not established that the order of the Commission is arbitrary, capricious or clearly erroneous.

ISSUE TWO

Should the Commodity Description Here in Question be More Broadly Construed in the Appellant's Individual Case in View of the Particular Circumstances Involved in the Proceedings Before the Commission in Which the Grants of Authority Here in Question Were Made?

Appellant's present certificate contains various grants of authority obtained either through "grandfather" proceedings or subsequent acquisitions. A portion of appellant's certificate involves authority to transport "iron and steel articles" from Chicago to Indiana, Ohio and Kentucky, and this authority was obtained by the carrier from Jack Foss and Elmer Sims, doing business as Motor Transport Lines, who obtained such authority based upon "grandfather" operations in existence on June 1, 1935.

Appellant adduced oral testimony in this case from shippers in an effort to show that the "grandfather" operations of Motor Transport Lines had included the transportation of such commodities as tractors, farm machinery, engines, etc. (see p. 7, Jurisdictional Statement).

Mr. Elmer Sims adduced substantially comparable testimony in this proceeding. The apparent purpose of such evidence would seem to be to seek broader construction of the term "iron and steel articles" than would otherwise obtain. In other words, appellant here argues that the Commission, at the time of the issuance of such grants of authority, intended a broader grant than would otherwise be warranted by the general meaning of the terms employed.

As is shown in the Report and Order of the Commission, dated July 15, 1957, the Commission reopened and re-examined all of the evidence offered in each of the

four basic proceedings as an interpretative aid in construing the grants of authority there made. After presenting a detailed resume of such examination, the Commission concluded as follows:

> "There is nothing of evidence in any of the basic proceedings which have been reviewed which could support a finding that when the various certificates or any of them were issued it was contemplated or intended that respondent's predecessors were being granted authority to transport tractors, traction engines, tools and parts for such tractors and traction engines, or used foundry machinery, or that they then understood they were obtaining such authority. Contrary to the claims of respondent there is nothing patently ambiguous in the certificate which applicant holds, and for that reason there was no necessity for going back of it in order to determine what was intended. Nevertheless, we have done so, and, as seen, have found nothing to suggest, even remotely, any right to, or any intent to grant, any of the commodities covered by the issues in the title proceeding." (pp. 18a and 19a of Jurisdictional Statement)

As above noted, appellant adduced testimony in this proceeding that prior to June 1, 1935, its predecessor had allegedly handled certain commodities that would be considered finished products and, therefore, not falling within the terms "iron and steel articles", and "iron and steel products" as these terms have been construed herein. Obviously, such evidence was *not* part of the record in the grandfather proceeding and cannot be considered as material in determining the original intent in the issuance of the subject authority. On this particular point, the District Court stated:

> "In any event, if plaintiff believes that the scope of his certificate is too restrictive when considered

against its background, his remedy is to petition the Commission to reopen the grandfather proceedings. *Nelson* v. *United States*, supra, at pp. 561, 562. This proceeding is concerned only with the interpretation of the certificate as it now exists." (p. 48a Jurisdictional Statement)

From the foregoing, it is plain that there is no basis for concluding that the Commission intended a broader grant of authority to appellant or its predecessors than would be encompassed by the normal meaning accorded the commodity descriptions by the motor carrier industry. The Commission reviewed each of the grandfather proceedings carefully and found no evidence to support appellant's contentions to the contrary.

CONCLUSION

We submit that the decision below is clearly correct in upholding the order of the Interstate Commerce Commission, and that this case presents no substantial question. The judgment of the District Court should be affirmed.

Respectfully submitted.

REX EAMES
ROLAND RICE

Attorneys for Intervenors

Of Counsel:

FRANKLIN R. OVERMYER

April 1960

CERTIFICATE OF SERVICE

I, Roland Rice, one of the attorneys for intervenors herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 27 day of April, 1960, I served copies of the foregoing document on the several parties hereto, as follows.

1. On Sims Motor Transport Lines Inc., by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to its attorney, Harold T. Halfpeny, Esq., 111 West Washington Street, Chicago, Illinois.

2. On the United States of America, by mailing a copy in a duly addressed envelope, with postage prepaid, to J. Lee Rankin, Solicitor General, and Robert A. Bicks, Acting Assistant Attorney General, Department of Justice, Washington 25, D. C.

3. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, with postage prepaid, to Robert W. Ginnane, Esq., its General Counsel, at the offices of the Commission, Washington 25, D. C.

ROLAND RICE